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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 549

JOHN A. HANNAH, ET AL., APPELLANTS

v.

MARGARET M. LARCHE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 550

JOHN A. HANNAH, ET AL., PETITIONERS

v.

J. A. H. SLAWSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE APPELLANTS IN NO. 549 AND THE PETITIONERS IN NO. 550

I

THE COMMISSION IS NOT AN ADJUDICATORY BODY AND DOES NOT PERFORM JUDICIAL FUNCTIONS

The brief for the appellees in No. 549—*Hannah* v. *Larche*—repeatedly characterizes the Civil Rights

537163—60——1

Commission's functions as judicial or adjudicatory (Br. pp. 6, 7, 8, 29, 32–34, 44, 46, 49). Their reliance on decisions involving the exercise of judicial and quasi-judicial power demonstrates that this point is central to appellees' case (Br. pp. 10, 12–13, 14–24, 32, 44–45).

It is submitted that characterization of the Commission as an adjudicatory body or as one possessing judicial powers is wholly erroneous. As amply demonstrated in our main brief (pp. 32–37), the Commission has no powers of adjudication. Beyond that, the function of the Commission is not to determine whether in any given case a particular official or individual has committed any crime or performed an unlawful act. The Commission is concerned only with determining and reporting to the President and the Congress facts indicating whether corrective measures are necessary in order to protect and secure basic constitutional rights. As Representative Keating, a sponsor of the bill which became the Civil Rights Act of 1957,[1] stated during the debates (103 Cong. Rec. 8497):

> The Commission is empowered only to study and investigate. It will not have power to prosecute, nor, of course, any power to legislate. The purpose of the Commission is primarily to determine whether there is need for further legislation in the field of civil rights.[2]

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[1] See p. 24 of our principal brief, note 15.

[2] See also: 103 Cong. Rec. 8859, Rep. Keating; 13897, Senator Johnson; 11989, 11990, 13457, Senator Kefauver; 12456, Senator Morse; 102 Cong. Rec. 12918, Rep. Keating; H. Rep. No. 291, 85th Cong., 1st Sess., pp. 5, 8; Hearings before Sub-

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If, as we believe to be entirely clear from the provisions and legislative history of the Act, the Commission's authority and functions are limited to making investigations and studies as a basis for corrective legislative or executive action, and it is not empowered to hold trials or determine rights or liabilities, it is of no consequence that an investigation conducted by the Commission might possibly reveal facts indicating that particular individuals may have committed illegal or reprehensible acts. A general fact-finding inquiry can proceed only through ascertainment of a mass of particular facts. Just as a design may be discerned only through assembling all the mosaics of which it is composed, so, too, an investigating body can intelligently ascertain and evaluate the total situation by inquiry into particular facets. This has been the practice of most of the great legislative inquiries in our history—inquiries which have led to important Congressional actions.

In *McGrain* v. *Daugherty,* 273 U.S. 135, Mr. Justice Van Devanter's opinion for the Court comprehensively examines the history and scope of legislative investigative power. In that case, also, it was contended that an otherwise proper legislative investigation is transformed into an improper judicial inquiry where the facts investigated may reveal evidence of criminality or wrongdoing. This contention, after full

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committee on Constitutional Rights, Senate Judiciary Committee, 85th Cong., 1st Sess., pp. 13–14, but cf. *id.* at p. 204 (testimony of Attorney General Brownell).

consideration, was rejected by a unanimous Court (pp. 179–180):

> We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

There is no support whatsoever for any inference that Congress intended, or that the Civil Rights Commission is engaged in, "exposure for the sake of exposure." Cf. *Watkins* v. *United States,* 354 U.S. 178, 187, 200; *Barenblatt* v. *United States,* 360 U.S. 109, 166 (opinion of Brennan, J., dissenting). If there were any possible doubt on this score, it is completely dispelled by the record of the Commission's activities.[3] In the context of the Commission's investigations of alleged deprivations of voting rights, such "exposure" as is involved would appear to affect the complainants more acutely than the persons against whom the complaints are directed. Cf. Record in No. 549, pp. 148–49. The primary focus of Section 104(a)(1) is upon

[3] We have lodged with the Clerk copies of the Report of the Commission on Civil Rights, transmitted to the President and Congress on September 9, 1959. It may be noted that Chapter V of Part Two, dealing with the Alabama voting hearing, concludes with "Findings of Fact" and "Conclusions of Law" made by the Commission. It clearly appears, however, that these are in the nature of broad legislative findings, which do not refer to any particular officials or individuals by name, and do not constitute any adjudication or determination regarding specific alleged deprivations of voting rights.

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the citizens whose constitutional voting rights are allegedly being violated, rather than upon the officials or persons who may be responsible for such violations. As the background and legislative history of the Act as a whole abundantly demonstrate, the principal concern of Congress was to secure in full measure the constitutional right to vote of all citizens, regardless of race or color. Section 104(a)(1) affords citizens complaining of any such deprivations with the opportunity to make known their grievances to a special agency established for the purpose of receiving and investigating these complaints and reporting its findings and recommendations to Congress and the President.

To be sure, Section 104(a)(1) requires that the allegations to be investigated shall be "in writing under oath or affirmation." This language, viewed in context and in the light of the legislative history, furnishes no basis for an inference that the Commission would in this regard be acting in other than an investigative capacity. The function of the Commission under Section 104(a)(1) is in one aspect a particularization of, and comprehended within, the general investigative authority provided by Congress in subparagraphs (2) and (3) of Section 104(a). In another aspect, subparagraph (1) is significant in making explicit the purpose of Congress that *voting* allegations, as distinguished from other rights protected by the equal protection of the laws under the Constitution, should be fully investigated by the Commission. The requirement that the voting allegations be in

writing and under oath or affirmation was added by Congress, not to alter the basic investigative function of the Commission, but as a "protective provision" to allay the fear expressed by some legislators that the Commission might otherwise be required to investigate flimsy or unsubstantiated allegations, oral and unsworn. Representative Keating pointed out (103 Cong. Rec. 8412):

> As a matter of fact, this bill is in essence, you might say, a watered-down version of the civil rights bill which this House passed in the last Congress. The only respects in which it is changed from that are that additional protective provisions have been written into it, such as, for instance, the provision that the same rules will apply to the hearings of the Commission on Civil Rights as apply to our own congressional committees; the fact that the subpena power to bring people before this Commission to testify is limited to the judicial circuit in which the witness is found; and that the complaints filed with the Commission must be sworn complaints in order to set in motion the procedure for hearing by the Commission.

And he later reemphasized (103 Cong. Rec. 8497):

> The Commission is to investigate allegations that persons are being deprived of the right to vote by reason of race, color, religion or national origin.
>
> To avoid the Commission's instituting unwarranted investigations, all allegations must be in writing, under oath or affirmation, and must set forth the facts upon which they are based.

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II

THE ADMINISTRATIVE PROCEDURE ACT IS INAPPLICABLE

Appellees further claim that Sections 5 and 7 of the Administrative Procedure Act (5 U.S.C. 1004, 1006) are binding on the Commission. This contention was rejected by the District Court (177 F. Supp. 816, 819 n. 3):

> The A.P.A. prescribes in section 7 (5 U.S.C. 1006), specific hearing procedures with respect to two processes; in section 4 (5 U.S.C. 1003) with respect to "rule making", and in section 5 (5 U.S.C. 1004) with respect to "adjudications." The Act contains no hearing requirements except where rule making or adjudications are involved. The Civil Rights Commission is performing neither function here.

This conclusion was clearly correct.[4]

Appellees' claim is based on the assumption that the findings and recommendations of the Commission constitute an order within the meaning of the Administrative Procedure Act and that accordingly the Commission necessarily "adjudicates."

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[4] In addition, Section 4 (5 U.S.C. 1003) specifically excepts the procedural rule-making function from the notice and hearing provisions. See *Gibson Wine Co.* v. *Snyder*, 194 F. 2d 329 (C.A.D.C.); Administrative Procedure Act, Legislative History, 79th Cong., 1944–46, pp. 200, 315 (hereinafter referred to as Legislative History). Likewise, Section 6 (5 U.S.C. 1005) has no relevance here because this section on its face applies only to ancillary functions of those governmental bodies whose functions come within the principal provisions of the Act. See *Torras* v. *Stradley*, 103 F. Supp. 737 (N.D. Ga.).

As shown in our principal brief (pp. 34–35) and under point I, *supra,* the Commission is a purely investigative body. Its function is not embraced by Section 5 of the Administrative Procedure Act which, as Representative Walter explained (Legislative History, p. 359):

> relates to the judicial function of administrative agencies where they decide specific cases respecting compliance with existing law or redress under existing law.

Beyond that, the Act applies only to a body which is an "agency" as defined by the Act. Section 2 (5 U.S.C. 1001) defines "agency" as "authority * * * of the Government of the United States." The term "authority" was defined by the Senate Judiciary Committee which analyzed and made suggestions as to each provision of the Act as follows (Legislative History, p. 13):

> It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. * * *

In the debates in the House, Representative Walter, in detailing the provisions of the bill, stated (Legislative History, p. 354):

> The definition of agency in section 2(a) of the bill is perfectly simple and consists of two

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> elements: First, there are excluded legislative, judicial, and territorial authorities. Secondly, there is included any other authority regardless of its form or organization. In short, whoever has the authority to act with respect to the matters later defined is an agency.[5]

The Civil Rights Commission, of course, can take no final or binding action with respect to "the matters later defined", *i.e.*, rule-making and adjudication. As indicated above, it neither makes rules (other than those relating to its procedures) nor adjudicates.

In short, it is clear that the Commission on Civil Rights is not an "agency" within the terms of the Administrative Procedure Act, and the provisions of Sections 5 and 7 have no applicability to it.

Finally, as developed at length in our principal brief (pp. 21–32), the Civil Rights Act of 1957 prescribed the procedures to be followed by the Commission. As the legislative history of the Administrative Procedure Act shows and the decisions of this Court hold, where such special procedures are embodied in the substantive statute, such procedures must be followed rather than those set forth in the Administrative Procedure Act. *Marcello* v. *Bonds*, 349 U.S. 302; Legislative History, p. 307.

CONCLUSION

For the reasons stated in our main brief, as supplemented above, it is respectfully submitted that the judgment of the District Court should be reversed.

J. LEE RANKIN,
Solicitor General.

JANUARY, 1960

[5] See also, Legislative History, pp. 196, 253.

537163—60——2

APPENDIX

In view of the importance of the legislative history of the Civil Rights Act of 1957 relating to the procedures to be followed by the Commission, we are reprinting in this Appendix, for the convenience of the Court, the pertinent excerpts from the hearings, committee reports, and debates:

Hearings

Before the House Rules Committee, 85th Cong., 1st Sess., p. 176, Testimony of Rep. Frazier:

> The authors of this proposal contemplate that it will yield thousands of complaints and even more thousands of subpenas will be issued. The various allegations will, in the first instance, be incontrovertible and wholly ex parte and the principal concerned, against whom the charges are made, when summoned as a witness is given no opportunity to cross-examine. True, the person summoned as a witness may have counsel (sec. 102), but only for the purpose of advising him of his constitutional rights.

Before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 85th Cong., 1st Sess., pp. 14–15, Testimony of Attorney General Brownell:

> Now there is one other addition to S. 83 that I would like to make special reference to and that is the provision for rules of procedure contained in section 102 on pages 2 to 10 of S. 83. These rules of procedure are considerably more restrictive than those imposed on regular committees of the House and Senate. There is much in them which clearly would be desirable.

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We have not as yet had any experience with the use of rules such as those proposed here and we cannot predict the extent to which they might be used to obstruct the work of the Commission.

Favoring as I do the imposition of proper rules of procedures upon all governmental committees and commisions which conduct public hearings in order adequately to protect the individuals called before them, I am reluctant to take a stand opposing the imposition of the rules here involved.

Yet I feel that the task to be given to this Commission is of such great public importance that it would be a mistake to make it the vehicle for experimenting with new rules which may have to be tested out under the courts and this is only a 2-year Commission and you might have to spend those 2 years studying the rules instead of getting at the facts.

Another reason why I think perhaps the substance of these rules should be eliminated from this particular bill is that the caliber of the men whom the President would appoint to the Commission would be such that they could be counted on to give the fairest opportunity to witnesses and protect all of their legitimate rights.

So for these reasons I would suggest the deletion of those rules from the bill.

Before Subcommittee No. 5, House Judiciary Committee, 85th Cong., 1st Sess., p. 593, Colloquy between Attorney General Brownell and Representative Keating:

Mr. Keating [referring to the procedures required by H.R. 627] * * * They are considerably more restrictive than the rules * * * for conduct of regular congressional committees. If this committee should decide to include a provision for the conduct of hearings held by the Commission which was in general similar to

those set up in the rules of the House for the conduct of congressional committees, would you see any objection [to] that?

Mr. Brownell. I am confident that the caliber of the Commission would be such that you could count on them to give the fairest opportunity to witnesses, to be sure that their legitimate rights are protected. Neverheless [sic], if it is demed [sic] advisable by the Congress to set up a special set of rules for that purpose, I think it is extremely important that everyone join in seeing to it that proper rules of procedure are followed by the Commission. I would have no objection.

Committee Reports

H. Rep. 291, 85th Cong., 1st Sess., p. 6 (Majority Report):

> Whenever the Commission finds that a person may be defamed, degraded, or incriminated by reason of testimony or evidence presented at a hearing, it must receive such evidence or testimony in executive session and afford such person an opportunity to appear as a voluntary witness. If requests are made of the Commission to subpena additional witnesses, it is within the authority of the Commission to consider and dispose of such requests. Evidence of testimony acquired in executive session can only be released or used in public sessions with the consent of the Commission. * * *

H. Rep. 291, 85th Cong., 1st Sess., p. 52 (Minority Report):

> * * * The rules provided in the bill are inadequate for more than one reason.
>
> First, the House, itself, in the 84th Congress saw fit to adopt a set of rules that are more detailed and stricter than those contained in the bill; better protection of the rights of all were provided for; more orderly procedure was re-

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quired of the Commission. The membership of the House wisely imposed its own judgment over that of the committee. It should do so again on H.R. 6127.

Second, the wisdom of the House is manifest, and the inadequacy of the rules in this bill is clear. While those rules are proper for a congressional committee they can't be for a commission in the executive branch of the Government * * *.

Statements in the Debates by the Proponents of the Civil Rights Act of 1957

103 Cong. Rec. 8412, Rep. Keating:

As a matter of fact, this bill is in essence, you might say, a watered-down version of the civil rights bill which this House passed in the last Congress. The only respects in which it is changed from that are that additional protective provisions have been written into it, such as, for instance, the provision that the same rules will apply to the hearings of the Commission on Civil Rights as apply to our own congressional committees * * *.

103 Cong. Rec. 8491, Rep. Celler:

The rules of procedure of the Commission are the same as those which govern the committees of the House. For example, the chairman is required to make an opening statement as to the subject of the hearing. Witnesses are furnished with a copy of the Commission's rules and may be accompanied by counsel. The chairman is authorized to punish breaches of order by censure and exclusion. Protection is furnished to witnesses when it appears that a person may be the subject of derogatory information by requiring such evidence to be received in executive session, and affording the person affected the right to appear and testify, and further to submit a request for subpena of additional witnesses.

103 Cong. Rec. 8497, Rep. Keating:

Investigations by the Commission will be bound by rules of procedure modeled after those applicable to congressional committees. A copy of these rules must be made available to every witness who appears before the Commission.

Witnesses before the Commission have the right to counsel, and the Chairman has the power to punish breaches of order and decorum on the part of counsel by censure and exclusion from the hearings.

If it should find that evidence or testimony about to be adduced at any hearing might defame or incriminate any person, the Commission must receive it in executive session and must afford the person involved an opportunity to appear voluntarily as a witness. In addition, the person involved may, through the Commission, subpena additional witnesses on his own behalf.

Brief and pertinent sworn statements in writing may be submitted by witnesses and included in the record at the discretion of the Commission.

For the further protection of persons who may be affected by investigations conducted by the Commission, we have inserted another provision, which is not found in the rules of the House pertaining to Congressional hearings. The bill makes the unauthorized release or use of evidence or testimony taken in executive session punishable by a fine of $1,000 or imprisonment for not more than 1 year.

103 Cong. Rec. 8865, Rep. Rogers:

There was a great deal of testimony by Members who appeared before the subcommittee who stated that irresponsible individuals would be making wild charges. If they came before this Commission and it was an open meeting

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and they made accusations against individuals which were untrue and unfounded, or that may tend to injure the reputation of certain people, we then authorized the committee to have an executive session and by having an executive session they could evaluate as to the responsibility of this particular individual and the testimony that he might give. So, in order to make sure that the rights of the individuals would be protected, we provide that the testimony shall not be released unless the committee does so itself.

103 Cong. Rec. 12457, Sen. Morse:

The rules of procedure specified in section 102 are excellent. They incorporate many of the reforms which I have urged for many years upon the Congress. They provide for formal hearings, the right to counsel, protection of persons adversely affected by testimony, protection against premature release of executive testimony. They are not perfect. In all candor, I must say that I would wish that the Senate would adopt more of the same provisions for all of its committee investigations. Especially noteworthy is the following provision:

"(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses."

Statements in the Debates by the Opponents of the Civil Rights Act of 1957

103 Cong. Rec. 8673, Rep. Kilday:

The bill provides that witnesses may be accompanied by counsel, for what purpose? "For

the purpose of advising them concerning their constitutional rights." That is all. Even though the Commission or its own counsel develops only a portion of a transaction, and that adverse to the witness, his lawyer cannot ask a single question to develop the remainder of the transaction or the portion favorable to him.

103 Cong. Rec. 8680, Rep. Grant:

> The members of the committee, in their working over of this bill, definitely improved it in that a new section requiring the Commission in its hearings to observe the same rules of procedure which govern Congressional committees was added and the bill was amended to require complaints filed before the Commission to be in writing, under oath, and specific in content. * * *

103 Cong. Rec. 8698, Rep. Forrester:

> Now, you want to send out somebody to investigate. You know, I will tell you something that would be revolutionary, but, by the grace of God, I want to do it, and I want to help you do it, and that is I want to see Congress quit abdicating its responsibility. If you think that these kinds of charges exist, I want to see you have a congressional committee. I want to see you make the investigation. Let the gentleman from Georgia, TIC FORRESTER, challenge you. I am challenging you. Get rid of this legislation. Come on next year with an investigation. Put us under television; put every one of them under oath; put all my people under oath, but, in the name of God, let the good people of the United States see it and let them hear it. Let them look at those witnesses, their demeanor on the stand, their opportunity for knowing or not knowing what they are saying about it. And I make you this proposition. I do not care who you select to question those

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witnesses. You know, I would be willing if you would just let a little fellow like me just defend the other side of it, just cross-examine them some, just make them come on and let their milk down, just get the cold truth. I am your Huckleberry. I am ready whenever you want to go. Yes; I am willing to throw this case into the hands of the American people, and, just as sure as you live, it is going to the American people. You are not going to escape your responsibility. Do not kid yourself.

103 Cong. Rec. 8847, Colloquy between Reps. Forrester and Boyle:

Mr. Forrester. * * * Oh, how I would like to meet you over there, I would like to meet the NAACP, and all of the rest of those boys and put them under oath. The kind of commission you have here is silly. Not a single witness will be under oath, did you know that? They can lie with impugnity. You are inviting lies, you are inviting perjury, you are inviting false swearing. It is a sad commentary upon the Congress of the United States.

Mr. Boyle. Mr. Chairman, will the gentleman yield?

Mr. Forrester. I yield to the gentleman from Illinois.

Mr. Boyle. Is it a fact I served with the gentleman in the 84th Congress in connection with this very bill?

Mr. Forrester. The truth of the matter is that the gentleman and myself are in harmony on most everything except this and I hope I can get him in harmony on this one.

Mr. Boyle. I want to say for the benefit of the record that the gentleman in the well of the House is a very fine lawyer. I should like to make the further observation at no time during all of the hearings did he come forward with a suggestion that maybe we ought to attach to

the procedure as it refers to this committee [sic], the oath and the cross-examination features.

103 Cong. Rec. 11504, Sen. Talmadge:

No provision is made for any period of advance notice of Commission hearings.

No provision is made for any public announcement of Commission meetings or hearings.

No provision is made for notification of persons against whom charges are to be made.

No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers.

No provision is made for accused persons to have access to testimony concerning themselves, whether adverse or favorable, unless it is officially released.

No provision is made for accused persons to offer rebuttal or in any wise to set the Commission records straight.

103 Cong. Rec. 13726, Sen. Talmadge:

Why must we be so lax in the Congress as to fail to require for this Commission even the ordinary safeguards, rules, and procedures necessary to protect the people?

Why cannot we require in the pending bill that there be in the conduct of the investigations and hearings of the Commission all the protective measures which we have come to demand and expect as a matter of right in this Republic?

Why cannot we guarantee the right of witness to adequate and reasonable notice?

Why cannot we give a person who is accused of wrongdoing by a witness before the Commission the right to cross-examine his accuser?

Why cannot Congress require that in the conduct of the Commission the hearings must be public—open to the people and to the press—

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and that there be a full public disclosure of all testimony and proceedings of the Commission?

103 Cong. Rec. 13835, Sen. Stennis:

> Defamatory testimony tending to defame, degrade, or incriminate any person cannot be heard by the person slandered, since the testimony must be taken in executive session. There is no requirement in the proposed statute that the person injured by defamatory testimony shall have an opportunity to examine the nature of the adverse testimony. He has no right of confrontation nor cross-examination, and his request to subpena witnesses on his behalf falls within the arbitrary discretion of the Commission. There is no right to subpena witnesses.

103 Cong. Rec. 13836, Sen. Stennis:

> * * * The discretion of the Commission to determine its jurisdiction, to write its rules of procedure, choose its time and place of hearings, to determine the extent of examination, to conceal forever most relevant portions of testimony developed, and to deprive the witness of confrontation, cross-examination, and even access to his own testimony, is completely arbitrary and untrammelled, subject only to the limitations the courts have imposed on procedures designed to protect our Government against subversives.

U.S. GOVERNMENT PRINTING OFFICE: 1960